# Rules and Regulations

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## DEPARTMENT OF ENERGY

### 10 CFR Part 852

**RIN 1901–AB13**

## Guidelines for Physician Panel Determinations on Worker Requests for Assistance in Filing for State Worker's Compensation Benefits; Procedural Amendments

**AGENCY:** Department of Energy.

**ACTION:** Interim final rule; request for comment.

**SUMMARY:** In order to expedite the handling of applications submitted by contractor employees or their survivors to the Department of Energy (DOE) Office of Worker Advocacy for assistance in pursuing workers' compensation under State law for illness or death arising from exposure to toxic substances at a DOE workplace, DOE today publishes and makes immediately effective certain procedural amendments. Today's procedural amendments will help streamline the processing of applications submitted to DOE under part D of the Energy Employees Occupational Illness Compensation Program Act of 2000 (''EEOICPA''). The amendments reduce from three to one the minimum number of physicians required for an affirmative physician panel determination in most instances. To ensure that the procedural amendments in today's rule accomplish their purpose, DOE invites public comment on today's rule.

**DATES:** *Effective Date:* March 24, 2004. *Comment Date:* Comments are due April 23, 2004.

**ADDRESSES:** You may submit comments, identified by RIN 1901–AB13, by any of the following methods:

Electronic comments may be submitted at the Federal eRulemaking Portal: *http://www.regulations.gov.*

E-mail comments may be submitted to: *Judy.Keating@eh.doe.gov.* Comments may be mailed to: Judy Keating, Room 6B–128, U.S. Department of Energy, Office of Worker Advocacy, EH–8, 1000 Independence Avenue, SW., Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:** Judy Keating, U.S. Department of Energy, Office of Worker Advocacy, EH–8, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–7551, e-mail address: *Judy.Keating@eh.doe.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On August 14, 2002, DOE published a final rule implementing part D of the Energy Employees Occupational Illness Compensation Program Act of 2000 (''the Act'') (42 U.S.C. 7384, *et seq.*), Guidelines for Physician Panel Determinations on Worker Requests for Assistance in Filing for State Workers' Compensation Benefits, 67 FR 52841. The rule, codified at 10 CFR part 852, sets forth procedures under which a DOE contractor employee or an employee's estate or survivor may seek assistance from the DOE Office of Worker Advocacy (''Program Office'') in filing a claim with the appropriate State workers' compensation system based on an illness or death that arose out of exposure to a toxic substance during the course of employment at a DOE facility. The rule also establishes the internal procedures to be followed by DOE in processing and considering an application for assistance.

DOE has received more than 20,000 applications for assistance under Part D of the Act. The Program Office conducts an initial screening of the applications to identify applications that are not eligible for assistance. An application must contain reasonable evidence that the following three conditions are met. First, the application was filed by or on behalf of a DOE contractor employee or the employee's estate or survivor. Second, the illness or death of the DOE contractor employee may have been caused by exposure to a toxic substance. Third, the illness or death may have been related to employment at a DOE facility. (See 67 FR at 52842–43, 52845).

Applications that pass the initial screening process are then submitted to a case development and document acquisition process whereby documents within DOE's control and relevant to the application are acquired from DOE's facilities and contractors, the files are organized, and a case summary is prepared. The complete application package is then presented to a Physician Panel for review. Pursuant to the terms of DOE's regulations, the Physician Panel reviews the package and determines whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. The Physician Panel determination is then forwarded to the Program Office.

Under DOE's regulations issued in August 2002, a Physician Panel is composed of three physicians appointed by the Secretary of Health and Human Services (''HHS''). The physicians are compensated at a rate not exceeding the cap established by law in 42 U.S.C. 7385o(d)(2)(B). Moreover, the Act requires that Physician Panel members have occupational medicine experience and competency in diagnosing occupational illnesses. (42 U.S.C. 7385o(d)(2)(A)). Only a small percentage of licensed physicians have the experience and competency in diagnosing occupational illnesses necessary to be qualified by HHS. While HHS has qualified over 150 physicians, participation on panels by qualified physicians is limited by the physicians' other professional obligations and a reluctance to devote time to this program for a number of reasons, including the compensation rate cap established by the Act (42 U.S.C. 7385o(d)(2)(B)).

The Physician Panels' review process is labor intensive; each physician is required to review all materials relating to the application. All panel members meet in conference, in person or by teleconference, in order to discuss the application and arrive at a determination agreed to by a majority of the members of the panel.

Today's rule permits a Physician Panel to be composed of a single qualified physician. Permitting single-physician panels will have the immediate effect of increasing the number of panels available to review completed applications. Single-physician panels will also simplify logistics by largely eliminating the time expended in coordinating and attending conferences, teleconferences, or meetings (though any panel physician is still free to consult with other appointed

physicians, Office of Worker Advocacy physicians, or other competent health care professionals, in accordance with DOE's regulations, to discuss assigned applications).

Today's rule also requires that negative determinations issued by a single-physician panel be reviewed independently by an additional single-physician panel. If the second single-physician panel issues a negative opinion, the Program Office accepts the two negative results. If the second single-physician panel issues a positive opinion, the case is reviewed independently by a third single-physician panel. The Program Office accepts the opinion of the majority of the three single-physician panels. Reexamination of an initial single-physician panel negative opinion assures that no application will receive a final negative determination based on the opinion of a single physician. DOE believes the use of single-physician panels coupled with a reexamination of single-physician panel negative determinations by additional single-physician panels will significantly increase the number of applications that can be reviewed by panels in a given time frame, while at the same time ensuring that this procedural change does not disadvantage applicants. Moreover, in DOE's experience, the usual time frame for providing a panel determination has been less than 20 days from the time of receipt by the panel. In less frequent cases, the rule would allow for the panels to request more time.

Today's rule amends § 852.13 to shorten the time permitted for a Physician Panel to make a determination and to submit the determination to the Program Office. DOE believes that the increased efficiencies of a single-physician panel will permit a more expeditious review of the application.

Today's rule will apply to all applications processed under part D of the EEOICPA. Cases that are presently being reviewed by three-physician panels will proceed to a determination by the panels as assigned. Cases assigned after the effective date of this rule will be assigned to single-physician panels or three-physician as determined by the Program Office.

## II. Section by Section Analysis

The definition of ''Physician Panel'' is revised to permit a single physician to constitute a ''panel'' for the purpose of determining whether a death or illness arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility under § 852.8. Previously, ''Physician Panel'' was defined as ''a group of three physicians. * * *'' This formulation proved to be burdensome, too resource-intensive and unnecessary for a thorough review of applications for assistance. Analyzing an application for assistance and issuing a determination under § 852.8 can be performed efficiently and thoroughly by a single physician. The definition adopted today preserves DOE's discretion to convene three-physician panels. Nevertheless, DOE contemplates that a single-physician panel will be used in most instances in order to expedite processing of the applications. DOE also has modified the definition of ''Physician Panel'' so that it more accurately describes the functions of such panels.

Section 852.16 is amended by adding two new paragraphs (a) and (b) that read as follows. ''(a) If a panel composed of a single physician issues a negative determination, the negative determination is considered an initial opinion and the Program Office must direct an additional single-physician panel to review the application and issue an independent opinion. If the second single-physician panel issues a negative determination, the Program Offices considers the opinions as a negative determination by the Physician Panel for purposes of § 852.17(a) of this part. (b) If a second single-physician panel issues a positive opinion, the Program Office must direct an additional single-physician panel to review the application and issue an independent opinion. The Program Office reviews the three opinions and considers the majority of the three opinions as the determination by the Physician Panel for purposes of § 852.17(a) of this part.'' The independent reviews must occur before the Program Office can accept a negative determination under § 852.17. The entire text of the original § 852.16 is unchanged, but has been redesignated as paragraph (c).

Section 852.11(b) is amended by adding the phrase, ''If a Physician Panel has more than one physician,'' to recognize that this paragraph does not apply to a panel composed of a single physician. The rule continues to allow Physician Panels to be composed of more than one physician. DOE thus would retain the discretion to use multi-physician panels should it decide do so. DOE might determine that particular groups of applications or applications presenting a particular type of alleged illness were appropriate for multi-physician panels. Or experience might demonstrate that in certain circumstances single-physician panels were less efficient than three-physician panels. The rule preserves DOE's ability to use single-physician and multi-physician panels in the most efficient, most fair way, based on DOE's experience as this program progresses. If DOE uses panels composed of more than one physician, the panels will continue to be required to meet, discuss the application, and arrive at a determination agreed to by a majority. However, a negative determination by panels composed of more than one physician would not automatically be submitted for review by additional physicians, as will be done with negative determinations by panels composed of only one physician.

Section 852.13 sets a limit on the time that may elapse between the submission of the completed application to the Physician Panel and the submission of the panel's determination to the Program Office. Today's rule adjusts the time for this action from 30 working days to 20 working days.

## III. Regulatory Review

### *A. Review under Executive Order 12866*

This regulatory action has been determined to be a ''significant regulatory action'' under Executive Order 12866, Regulatory Planning and Review. *See* 58 FR 51735 (October 4, 1993). Accordingly, today's action was subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.

### *B. Review Under the Paperwork Reduction Act*

No new information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 501 *et seq.* are imposed by today's regulatory action.

### *C. Review Under Executive Order 13132*

Executive Order 13132, ''Federalism'' (64 FR 43255, August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy

describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

*D. Review Under the National Environmental Policy Act*

DOE has concluded that today's rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, today's amendment to the Physician Panel procedures is covered under the Categorical Exclusion for rulemakings that are strictly procedural in paragraph A6 of appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

*E. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 requires each agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final rule that may result in the expenditure by State, local, and tribal governments and the private sector, of $100 million in any single year. DOE has determined that today's regulatory action does not impose a Federal mandate on State, local, or tribal governments or on the private sector.

*F. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, directs agencies to prepare a regulatory flexibility analysis whenever an agency is required to publish a general notice of proposed rulemaking for a rule. DOE has determined that today's rule is procedural and is not subject to prior notice and opportunity for public comment. In accordance with 5 U.S.C. 604(a), no regulatory flexibility analysis has been prepared for today's rule.

*G. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

*H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*I. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*J. Review Under Executive Order 13211*

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), requires Federal agencies to prepare and submit to OIRA, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*K. Congressional Notification*

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's rule. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

**List of Subjects in 10 CFR Part 852**

Administrative practice and procedure, Government contracts, Hazardous substances, Workers' compensation.

Issued in Washington, DC, on March 17, 2004.

**Robert G. Card,**

*Under Secretary for Energy, Science and Environment.*

■ For the reasons set forth in the preamble, 10 CFR part 852 is amended as follows:

## PART 852—GUIDELINES FOR PHYSICIAN PANEL DETERMINATIONS ON WORKER REQUESTS FOR ASSISTANCE IN FILING FOR STATE WORKER'S COMPENSATION BENEFITS

■ 1. The authority citation for part 852 continues to read as follows:

**Authority:** 42 U.S.C. 7384, *et seq.*; 42 U.S.C. 2201 and 7101, *et seq.*; 50 U.S.C. 2401 *et seq.*

■ 2. Section 852.2 is amended by revising the definition of the term ''Physician Panel'' to read as follows:

**§ 852.2 What are the definitions of terms used in this part?**

* * * * *

*Physician panel* means one or more physicians (as determined by the Program Office), who are appointed by the Secretary of Health and Human Services, pursuant to part D of the Act, to evaluate applications of DOE contractor employees, under the procedures and requirements of this part.

* * * * *

■ 3. Section 852.11 is amended by revising paragraph (b) as follows:

**§ 852.11 How is a Physician Panel to carry out its deliberations and arrive at a determination?**

* * * * *

(b) If a Physician Panel has more than one physician, all panel members meet in conference, in person, or by teleconference in order to discuss the application and arrive at a determination agreed to by a majority of the members of the Physician Panel.

* * * * *

■ 4. Section 852.13 is amended by revising paragraph (a) as follows:

**§ 852.13 When must a Physician Panel issue its determination?**

(a) A Physician Panel must submit its determination and findings to the Program Office within 20 working days of the time that panel member(s) have received the complete application for review from the Program Office.

* * * * *

■ 5. Section 852.16 is revised to read as follows:

**§ 852.16 When may the Program Office ask a Physician Panel to reexamine an application that has undergone prior Physician Panel review?**

(a) If a panel composed of a single physician issues a negative determination, the negative determination is considered an initial opinion and the Program Office must direct an additional single-physician panel to review the application and issue an independent opinion. If the second single-physician panel issues a negative determination, the Program Offices considers the opinions as a negative determination by the Physician Panel for purposes of § 852.17(a) of this part.

(b) If a second single-physician panel issues a positive opinion, the Program Office must direct an additional single-physician panel to review the application and issue an independent opinion. The Program Office reviews the three opinions and considers the majority of the three opinions as the determination by the Physician Panel for purposes of § 852.17(a) of this part.

(c) The Program Office may direct the original Physician Panel or a different Physician Panel to reexamine an application that has undergone prior Physician Panel review if:

(1) There is significant evidence contrary to the panel determination;

(2) The Program Office obtains new information the consideration of which would be reasonably likely to result in a different determination;

(3) The Program Office becomes aware of a real or potential conflict of interest of a member of the original panel in relation to the application under review; or

(4) Reexamination is necessary to ensure consistency among panels.

[FR Doc. 04–6555 Filed 3–23–04; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. 2003–CE–55–AD; Amendment 39–13531; AD 2004–06–05]**

**RIN 2120–AA64**

## Airworthiness Directives; Pilatus Aircraft Ltd. Models PC–12 and PC–12/45 Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA adopts a new airworthiness directive (AD) for all Pilatus Aircraft Ltd. (Pilatus) Models PC–12 and PC–12/45 airplanes. This AD requires you to determine whether certain main landing gear shock absorber attachment bolts have been replaced and, if not replaced, would require you to replace shock absorber attachment bolts on main landing gear assemblies that have a serial number beginning with AM001 through AM053. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Switzerland. We are issuing this AD to detect and correct hydrogen embrittlement in the main landing gear shock absorber attachment bolts, which could result in failure of the main landing gear. This failure could lead to main landing gear collapse during operation with consequent loss of airplane control.

**DATES:** This AD becomes effective on May 6, 2004.

As of May 6, 2004, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

**ADDRESSES:** You may get the service information identified in this AD from Pilatus Aircraft Ltd., Customer Liaison Manager, CH–6371 Stans, Switzerland; telephone: +41 41 619 63 19; facsimile: +41 41 619 6224; or from Pilatus Business Aircraft Ltd., Product Support Department, 11755 Airport Way, Broomfield, Colorado 80021; telephone: (303) 465–9099; facsimile: (303) 465–6040.

You may view the AD docket at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–CE–55–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Office hours are 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

**SUPPLEMENTARY INFORMATION:**

### Discussion

*What events have caused this AD?* The Federal Office for Civil Aviation (FOCA), which is the airworthiness authority for Switzerland, recently notified FAA that an unsafe condition may exist on Pilatus Models PC–12 and PC–12/45 airplanes. The FOCA reports that certain shock absorber attachment bolts (part number 532.10.12.110) in the main landing gear assemblies could fail during operation. Investigations revealed that an improper cadmium plating process applied to the high strength steel part causes the problem. This can cause hydrogen embrittlement.

The only bolts affected are those installed on main landing gear assemblies with a serial number that starts with AM.

*What is the potential impact if FAA took no action?* Failure of the main landing gear could lead to main landing gear collapse during operation with consequent loss of airplane control.

*Has FAA taken any action to this point?* We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all Pilatus Models PC–12 and PC–12/45 airplanes.